

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : 21-CR-265(PKC)

-against-

: United States Courthouse
: Brooklyn, New York

: June 15, 2023
: 9:00 a.m.

MICHAEL McMAHON, ZHENG
CONGYING, and YONG ZHU, also
known as "Jason Zhu,"

Defendants.

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TRANSCRIPT OF CRIMINAL CAUSE FOR JURY TRIAL
BEFORE THE HONORABLE PAMELA K. CHEN
UNITED STATES DISTRICT JUDGE

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20 Proceedings recorded by computerized stenography. Transcript
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1 (In open court.)

2 (The Hon. Pamela K. Chen, presiding.)

3 (Defendants present.)

4 THE COURT: While we're getting the jury, let me
5 confirm that the defense has seen the overt acts that the
6 Government prepared for the jury instructions.

7 MR. LUSTBERG: Yes, Your Honor. We reviewed them
8 last night and indicated our consent.

9 THE COURT: Good. Terrific. Thanks.

10 (Jury enters.)

11 THE COURT: Please be seated, everyone. Good
12 morning, ladies and gentlemen of the jury. I hope you had a
13 good evening and avoided the rain, or at least brought an
14 umbrella. I did not.

15 Let's have Mr. Heeren continue his rebuttal.

16 MR. HEEREN: Thank you, Your Honor.

17 THE COURT: Go ahead.

18 CONTINUED REBUTTAL CLOSING ARGUMENT

19 BY MR. HEEREN:

20 MR. HEEREN: Good morning. As I briefly explained
21 yesterday, nothing counsel for the defendants said in their
22 closing changes the basic facts of this case. The defendants
23 each agreed to participate in a scheme to harass and
24 intimidate the victims so that they would return to China.
25 And they did so at the direction of the Chinese government.

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1 Now, I'm not going to repeat what I said yesterday,
2 but I do want to briefly remind you and reorient you to a few
3 of the points I had made.

4 First, the evidence against Congying Zheng is
5 overwhelming. There is simply no question that he
6 deliberately left the threatening note for the victims to
7 find. DNA, fingerprints and a video confirm that fact.
8 Counsel conceded as much. His only defense was a claim of
9 withdrawal, which is not a defense to the crime of interstate
10 stalking. And as I expect you will learn today, does not
11 support a defense to his involvement in the conspiracy either.

12 Remember that the evidence showed at the end of the
13 day Zheng successfully threatened his intended victims. Xu
14 Jin and Liu Fang were the ones who found the note. He did not
15 get it back when he went back. They found the note and they
16 took it down, and they were, in fact, intimidated. And of
17 course, as I mentioned yesterday, the note itself made clear
18 -- made plain to Zheng what was obvious. This message had
19 been handed down to him from the Chinese government.

20 Second, as to Zhu Yong, as I mentioned yesterday, it
21 is indisputable that Zhu was in direct contact with multiple
22 Chinese government officials such as Hu Ji and Sun Hui. Those
23 are some of the same officials who are running the overall
24 stalking conference with Defendant McMahon, who coordinated
25 with prosecutor -- Chinese prosecutor Tu Lan, and who directed

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1 additional reporting from coconspirator Johnny Zhu. This is
2 not a coincidence. And Zhu Yong himself admitted as much in
3 his post arrest interview. He knew Hu Ji had come to the
4 United States to locate the victim Xu Jin.

5 This is also not a mistake or confusion. Zhu Yong
6 on his own in that interview explained in detail about the
7 Chinese government's structure involved in this operation, the
8 bureau involved, the different departments competing for it.
9 And he knew exactly what he was doing. Go back to that e-mail
10 that defense counsel for Mr. Zhu put in, that agreement that
11 he forwarded to Sun Hui belonged to is the QQ account. Look
12 at it again. There's no message in that forward. He just
13 forwards it. He forwards it with no message because they have
14 already communicated. He knows what he is getting. No
15 explanation is needed because they had already been in touch.
16 They knew what the plan was.

17 So, I want to spend the remainder of what I hope
18 will be a short amount of time here responding to some of the
19 arguments made by Defendant McMahon's counsel.

20 Now, one of Mr. McMahon's arguments was that he was
21 contacted originally by an attorney that he knew, a friend of
22 his, and that he did not have any history of working with the
23 Chinese government. But that's besides the point. That was
24 never the proof. That was never the argument. It's not the
25 basis for these charges. The issue is whether at some point

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1 Mr. McMahon learned and knew he was working for the Chinese
2 government and agreed to do that work. And the answer is he
3 learned right away, days after he was contacted. You saw the
4 evidence. You heard it in our original summation. He had
5 done some cursory Googling and quickly learned that the
6 Chinese government was the one trying to arrest the person he
7 was hired to investigate.

8 Now, Counsel made much of the idea that the average
9 American wouldn't know what Skynet or Fox Hunt is, but we
10 don't need to wonder about the average American. He had a
11 document in his possession that he read and then forwarded it
12 to himself again in 2017 that said "Operation Skynet is an
13 operation to get people back to China." Go look at it
14 yourself and read the quote. We don't have to wonder. He
15 knew. He had the information in hand.

16 Even after he learned that the target was wanted by
17 the Chinese government, he decided to take the job. You read
18 the e-mail where he said "I accept this job." And you know he
19 understood what he was doing because he told you as much after
20 he was arrested. The goal of the conspiracy was to find Xu
21 Jin so they, meaning the Chinese government, could prosecute
22 him.

23 Compare Mr. McMahon's knowledge and actions or his
24 claimed knowledge and action to what Eric Gallowitz told you.
25 Eric Gallowitz, a former NYPD officer, a friend of

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1 Mr. McMahon, a witness called by the defense. His testimony
2 was that the circumstances were atypical. That was the word
3 he used, atypical. That means unusual, strange, different.
4 He told you he thought it was related to a criminal matter
5 based on seeing that Interpol notice that Mr. McMahon
6 forwarded to him.

7 Now, consider the fact that Eric Gallowitz only had
8 that small sliver of information. He did not know the
9 clients, and he told you he did not attend the in-person
10 meetings with Chinese police officer who Hu Ji, co-defendant
11 Zhu Yong, and then that separate hour-long meeting between
12 McMahon and co-conspirator Johnny Zhu.

13 So consider that -- consider all of the additional
14 information that McMahon had, the fact that who he was hired
15 by kept changing, four or five different people, that he was
16 asked to obtain unusual information, such as international
17 travel information about these people, about their daughter's
18 major. And I want to pause on that because counsel put up
19 Government Exhibit 3026, and said, take a look at this, it's
20 just financial information, who would know. Go look at the
21 e-mail. After a little talk about the financial information,
22 they say, by the way, what can you find out about the
23 daughter, what's her major, what is she studying, what is she
24 doing. You don't need somebody's child's major for a lawsuit.
25 You need it so that you can tell the person we know her major.

1 That's an intimidating fact to learn that the Chinese
2 government has learned.

3 And of course, he knew that they were bringing an
4 old man from China to New Jersey. Another fact that Eric
5 Gallowitz didn't know. Gallowitz was able to tell you with a
6 small sliver of information that he knew something was wrong,
7 something was atypical. McMahon knew the full story. He knew
8 it was wrong. He absolutely knew.

9 Now, setting aside the fact that there is direct
10 evidence, as we've shown, that Mr. McMahon knew, like his own
11 statements, Mr. McMahon argued that he can't be convicted
12 because there's no single piece of writing that says, I direct
13 you to work for the Chinese government. You are to stalk this
14 person. That's not the law. As you will be instructed, and
15 as I'm sure you'll not find surprising, a criminal conspiracy
16 is often done in secret. And the criminal purpose is often
17 not spelled out in writing. It would not be a good move.

18 And here, we know that the defendants and their
19 conspirators deliberately left much of this criminal activity
20 to in-person meetings and telephone calls so the statements
21 could not be later used against them. Now, this is where
22 context matters.

23 Defense counsel put up that picture of McMahon and
24 Chinese police officer Hu Ji and co-defendant Zhu Yong and
25 said it's just three men standing in a Panera Bread and the

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1 government wants to convict them for being three men standing
2 in a Panera Bread. That's, of course, not the case. That's
3 one piece of evidence in a larger set of evidence. When you
4 look at it together, you know what it really means. Think
5 about this picture.

6 Remember Government Exhibit 4044 at 788. That's the
7 day of the meeting at that Panera Bread when that picture was
8 taken. And Jason Zhu, through the interpreter, contacts
9 McMahon and says he needs to meet with McMahon ASAP. You know
10 what that means. When someone says I need to see you ASAP,
11 that means I need to talk to you about something important.
12 Not a chitchat. Something important.

13 There's a reason why Zhu Yong and the Chinese police
14 officer, Hu Ji, traveled from China to New Jersey specifically
15 for that meeting, why they didn't leave it to an e-mail or
16 even a phone call. They weren't going to tell the truth, the
17 detailed truth, of the criminal activity in something that
18 would be recorded. They needed to tell McMahon about it in
19 person. And you know that they told him something important
20 and what he told them by what happened next.

21 Immediately after that meeting, McMahon hits up his
22 buddy in the DEA, Greg Finning for international travel
23 information. That's Government Exhibit 4006-B, pages 830 to
24 841. And then a few weeks later, McMahon starts communicating
25 directly with Eric Yan, who you all know is Hu Ji, the Chinese

1 police officer. Eventually passing him Department of Homeland
2 Security information about a person's travel outside of the
3 United States.

4 They met in person to talk about getting that
5 information because they knew that that was part of an illegal
6 scheme. And there's a reason why they had that second
7 in-person meeting in April of 2017. I'm not going to go into
8 this in too much detail because my colleague, Ms. Arfa, laid
9 this out to you very well. She showed you those slides, if
10 you remember.

11 Let's just put them back up for a moment.

12 (Exhibit published.)

13 MR. HEEREN: Again, context is everything. The
14 surveillance photo of Mr. McMahon walking into the Panera
15 Bread with his co-conspirators is not the only evidence. The
16 evidence is the day before, Prosecutor Tu Lan directed Johnny
17 Zhu to tell McMahon everything. Then they had a meeting, an
18 hour-long meeting. Defense counsel conceded as much, yes, it
19 is an hour-long meeting. They weren't talking about the
20 weather for an hour.

21 After that hour-long meeting, the next day when the
22 operation goes into effect, when the father is brought here,
23 it's seamless. There's no confusion. There's no questions.
24 Johnny Zhu says, I just got the package, ETA 7:40. The man
25 does not say, What? What package? What do you mean? He

1 knows what's going on. And when later Johnny Zhu says do you
2 see the old man? Again, no confusion. He knows who he's
3 talking about, what he's looking for and what he needs to be
4 observing in the middle of the night, because they spent an
5 hour talking about it.

6 It's fair to infer in circumstances like this that
7 based on the things they said in the writing and what they did
8 after meetings, you can infer what happened at those meetings
9 and you can infer fairly that it was part of the illegal
10 scheme and providing further information and knowledge to
11 Michael McMahon.

12 And, of course, I would be remiss if I didn't
13 mention during that post arrest interview when Mr. McMahon
14 admits, well, I knew they were going to prosecute him. And
15 again, they were going to prosecute him. That's never in any
16 writing. That's not written down anywhere. How did he know
17 that? Because he was told it in those meetings and on phone
18 calls. He was asked, well, how did you learn about all of
19 this? And he answers, I think they told me on a phone call.
20 So we know it's not just the written evidence, although that
21 written evidence is quite damning.

22 Mr. McMahon pointed to several different items, and
23 it's the prevalent proof that he actually did not know. None
24 of these arguments stand up to even basic scrutiny. Let's
25 start with the first one. McMahon makes much of the fact that

1 they used the word company in certain of the chat messages.

2 Please -- we put those chat messages in -- go review
3 them. But I want to remind you of something. Again, context
4 is everything. Remember those initial conversations with
5 McMahon. He's not told he's hired for a company. First he's
6 told he's got a female client that wants to hire you. Then
7 the gender changes and it's Mr. Jason Xu, who wants to hire
8 you. He has a personal debt to collect.

9 And only later when Eric Yan shows up and they start
10 using the word "company." And of course, in between those
11 times Mr. McMahon did the only bit of research before
12 accepting this and learned, well, it's the Chinese government.
13 He knew from the start that there was no company involved. Go
14 read the text messages. Go see if you can find a single
15 description of this supposed company. See if you can find a
16 name for the company. If McMahon thought he was working for a
17 company, don't you think he would at least know the name of
18 it? Go look at his voice. You heard from Eric Gallowitz he
19 invoices his client -- he invoiced his client, the business,
20 McMahon Investigative Group. Compare that to Michael
21 McMahon's invoices. No company there. Eric Yan, Johnny Zhu,
22 Jason Zhu. It tells you the story as well. This talk of a
23 company is nothing. It was a flimsy cover story that they
24 shared. A nod and a wink to what was really happening. A way
25 to talk around what they all knew was true.

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1 And you know that because eventually towards the end
2 when they were excited because they had succeeded, Johnny Zhu
3 let slip the truth. Government Exhibit 805-B, at pages 31 to
4 33. After McMahon had located the address of Xu Jin. After
5 this complex scheme to bring and force his father to the U.S.
6 to try to force him back had one objective of finding the
7 victim's home. They started talking about next steps and they
8 were excited and Johnny Zhu said, the Government, they
9 definitely grant you a nice trip if you can get Xu back to
10 China. Ha-ha. And McMahon said, Oh, nice. Again, to get Xu
11 back to China. Not to get the money. Not to do a lawsuit.
12 To get Xu back to China.

13 They didn't say we'll grant you extra for helping
14 that company, for helping Whatever, Inc., we still don't know
15 the name. He talked about bringing Xu Jin back to China,
16 because that's what it was about, doing something for the
17 Chinese government.

18 As I mentioned before and allowed the waiver, even
19 Eric Gallowitz knew this wasn't something about the company.
20 It was a criminal matter.

21 And that leads me to my next point. Defense counsel
22 said -- I forget the exact phrasing, but he described it as
23 normal private investigator work, ordinary couple of days of
24 surveillance. Again, you know the evidence doesn't bear that
25 out. Early on, he was told no attorneys involved. His client

1 list keeps changing. He's told Jason Zhu is owed money and
2 then Eric Yan, and then a guy named Johnny Zhu comes in.
3 Think about how he's paid. It keeps changing. He goes from
4 getting a wire to then -- as soon as he's notably -- after he
5 does the research and finds that China daily article about
6 Skynet, he transferred the cash, the \$5,000 in cash that
7 doesn't make its way into a bank account. \$3,000 in cash that
8 he puts in his son's bank account. That's not normal. That's
9 not normal business activity. And of course, most
10 significantly, it's not in a vacuum, all these pieces. Most
11 significantly, the elephant in the room that was not addressed
12 when counsel was talking about normal surveillance, what was
13 he surveilling? He was surveilling a driver and a doctor
14 bringing an elderly man to a house. And he knew about that.
15 I asked Eric Gallowitz that question. I said, you know,
16 dozens of surveillance, have you ever done anything like that
17 before in your life? Never. It's not ordinary. It was
18 atypical, as he said.

19 And McMahon knew this wasn't ordinary PI work. He
20 knew it. He knew it was stalking and harassment because he
21 himself discussed ratcheting it up, harass them directly.

22 Now, McMahon also suggested in his argument that his
23 calls to the local police and to the DEA was somehow proof
24 that he wasn't involved. Some suggestion that this was him
25 trying to do the right thing. The exact opposite is true.

1 Rather than use his law enforcement background to steer clear
2 of this obvious criminal activity to report suspicious
3 activity, he actually used his experience to help the crime
4 succeed. Think about it, McMahon leaned on his friend at the
5 DEA to take information from a sensitive government database.
6 He had his friend violate obvious government rules and
7 regulations so that he can pass that information back to a
8 Chinese official located in China. Why? Because he knew --
9 McMahon knew what he was doing was already illegal. Hu Ji
10 asked him to get international travel information, and this
11 was the only way to get accurate information. It demonstrates
12 McMahon's guilty mind.

13 Now let's talk about the contact to local police.
14 He contacts them when he's doing surveillance. Not to tell
15 them, hey, I've got this atypical operation here with an old
16 man. He contacts the police so they don't come. Think about
17 it.

18 Go read the police report. There's nothing about
19 the details of the operation in that police report. The
20 police reports say, hey, just FYI, there's going to be some
21 PI's here, don't worry about any suspicious activity calls.
22 That's not designed to get the police's attention. That's
23 designed to keep the police away. Eric Gallowitz told you
24 that when I asked him that question. He said they're less
25 likely to show up when you call. That's the transcript, at

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1 page 1831. And, remember, they discussed this in realtime.
2 They put it in an exhibit, Government Exhibit EG 3. Gallowitz
3 asked McMahon, you're not going to tell the local police why
4 we're here; correct? And McMahon said, no, I'm not going to
5 do that.

6 He called the police to avoid being caught committing
7 a crime because he didn't want somebody to call and say, hey,
8 there's several suspicious vehicles driving around the
9 neighborhood, can you see what's up. They didn't want to be
10 frustrated in their pursuit. He leveraged his role as a
11 private investigator and former police officer. He used his
12 experience to ensure that no one would come and help if anyone
13 called now.

14 I want to briefly address Mr. McMahon's law
15 enforcement background a little bit more since it was a major
16 point at the beginning of this case.

17 Now, the evidence shows that McMahon knew what he
18 was doing, regardless of his background. But to the extent
19 that you need to consider whether McMahon consciously avoided
20 knowing what was going on, consider this fact: If anyone
21 should have known what he was doing was wrong, that there were
22 major red flags that he should have looked into, that he was
23 obviously participating in criminal activity, it was a former
24 member of law enforcement. I won't belabor all the unusual
25 circumstances again, but think about all of those things we

1 talked about. You would think that a former member of law
2 enforcement, a former detective, you heard from Eric
3 Gallowitz, detectives investigate crimes and they're supposed
4 to ask questions. When something doesn't add up, you follow
5 up. That's why I asked those questions. It's obvious. But I
6 had to draw it out, because McMahon didn't do those things,
7 despite his training and experience. He didn't ask those
8 questions. He didn't investigate. He looked the other way,
9 at best. He knew what an arrest warrant was. He knew what it
10 meant to prosecute somebody. He knew what was going on.

11 Now, counsel pointed to our arguments about
12 Mr. McMahon's financial activity in this scheme and argued
13 that we were just claiming he was guilty because he was paid
14 in cash. And that's obviously not true. Yes, people get paid
15 in cash sometimes, we agree. The point is the nature of the
16 financial transactions and how deeply suspicious they were.

17 Will you please put up that slide again?

18 (Exhibit published.)

19

20 (Continued on the following page.)

21

22

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24

25

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1 (Continuing)

2 (Exhibit published.)

3 MR. HEEREN: This is not a single payment in cash.
4 Just look at how this evolved over time. This is consistent
5 with a person who knows this cash is coming from something
6 illegal and he's trying to walk away from it, push it away
7 from his business. Some of it he doesn't even put an account.
8 Just because he conceals it badly doesn't mean it's not an
9 attempt to conceal it.

10 And I would note, Counsel didn't even respond when
11 he was making his point to the fact that \$5,000 is just
12 unaccounted for. Just takes it and doesn't put it anywhere.
13 Why does he do that? Why don't he account for it? He knows
14 that money is dirty.

15 And I would note that the payments to his son's
16 account, it wasn't even supposed to go there. Go back to
17 Government's Exhibit 805-B at pages 14 to 17. Johnny Zhu is
18 the one who suggests putting the money into a bank account.
19 And he says: I don't want to drive two hours again. He
20 doesn't want to drive two hours again. McMahon is the one who
21 said: drive two hours to drop it to me in cash. He wanted it
22 in cash. So if he had had it this way, it would be \$8,000
23 that is in a question mark box.

24 Why would you do this if this was an ordinary
25 business transaction? You heard from Paul Brickfield. We

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1 asked him. Has he ever paid Mr. McMahon that way? The answer
2 was: No.

3 And the tax returns that we pointed to just cement
4 this point. He received a large amount of money, and I'm not
5 going to quibble about it; they claim it's \$11,000 not
6 \$19,000. Even if we're talking about net instead of gross
7 profit, \$11,000 for what they claim is five days of work is
8 quite a bit of money still. He received a large amount of
9 money that he ultimately did not report. And as I expect you
10 will hear, you are going to be instructed that willful intent
11 or guilty knowledge may be inferred from the secretive or
12 regular manner in which a transaction is carried out. The way
13 that money moved into McMahon's pockets is obviously
14 irregular.

15 Finally, I want to last talk about stalking; the
16 stalking charges, which is where McMahon's Counsel ended.
17 Counsel for McMahon wants you to limit your consideration of
18 whether McMahon engaged in stalking to only hit McMahon's
19 personal, individual conduct. But that's not how aiding and
20 abetting liability works. If McMahon associated himself with
21 a crime and took steps to help make that crime succeed, then
22 he is guilty of aiding and abetting. If someone who helps
23 another person commit a crime is -- someone who helps another
24 commit a crime is as guilty as if he had committed the crime
25 himself. Listen to the instructions on it and follow the

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1 Court's instructions.

2 So here, even if you don't believe that McMahon
3 personally harassed or intimidated the victims, though I
4 submit the evidence shows he did just that, he certainly took
5 steps to make the stalking done by Tu Lan, Johnny Zhu, and the
6 others in that scheme succeed. He knew about the April 2017
7 plan to bring the father over. He actually helped Johnny Zhu
8 and his coconspirators keep the operation under wraps by
9 calling the police and keeping them at bay. He agreed that he
10 would -- he would surveil the house while the father went in
11 and then followed whoever went to meet with the elderly man.
12 He helped the plan succeed through his overall course of
13 conduct. That's enough. That makes him an aider and abettor.

14 Now a few other minor points.

15 Counsel argued that McMahon was never seen during
16 the surveillance operation so he couldn't have possibly
17 harassed him or intended to harass him. I just want to note,
18 that's just wrong. The evidence proves otherwise. It was at
19 the beginning of the case, but Liu Yan testified, the
20 sister-in-law. She testified, if you recall, that she saw
21 someone that she thought was tailing her, following her, the
22 morning she was driving her father to the mall. Remember she
23 described the person as non-Chinese. And that's actually, she
24 thought, you know, she was a little bit less stressed out by
25 it, okay, probably just be a Chinese person who's following

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1 me. That's at page 98 of the transcript.

2 And if you are remember, around that time we showed
3 her a picture that she identified as herself, right? She said
4 yeah, that's me. And that was Government's Exhibit, I
5 believe, 4010-A. Go look at Government's Exhibit 4010 at
6 page 123. Those are text messages between Michael McMahon and
7 Johnny Zhu from April 6th, 2017, in the morning. And he texts
8 Johnny Zhu a picture of Liu Yan that he took on surveillance,
9 while she was driving her father to the Livingston mall. It
10 was not totally covert. He was seen. And he was startled.
11 He was frightened.

12 And, of course, you know that McMahon did not want
13 to be totally covert. He told them: Let's go over, let's
14 harass them. It's a small part of the overall scheme, but
15 it's important to remember that this was not, in fact, covert.

16 Another incorrect statement that was made was that
17 well, they didn't need McMahon's help, they didn't get the
18 address from McMahon, there's no evidence that they actually
19 got Xu Jin's address from Michael McMahon. Again, that's not
20 correct. Government's Exhibit 805-B, at page 5. We had it
21 redacted because we didn't want to show the exact address on
22 screen, but go look at the unredacted version that you'll have
23 access to. McMahon texts Johnny Zhu the exact address.
24 That's the first time in the evidence of the address being
25 received, confirming Xu Jin lives there.

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1 Go to Government's Exhibit 2002, right around that
2 same time. McMahon e-mails the surveillance photos he then
3 takes of the home at that address to Johnny Zhu, which Johnny
4 Zhu then forwards up the chain to his Chinese government
5 handlers.

6 And then, of course, go to Government's
7 Exhibit 3074, a direct email between Chinese police officer Hu
8 Ji as Eric Yan, to Michael McMahon, where he literally says:
9 Thank you for finding Xu Jin's address. Again, it's one piece
10 of the overall scheme, but it was a critical piece. He was
11 essential.

12 You know, finally, Counsel for all the defendants
13 argued in various ways that their clients are the real victims
14 here. I think one of them said, you know, my client was a
15 victim, too. I don't want to spend too much time on that, but
16 I do want to just pause on that thought for a second. I want
17 to ask you to think about that and consider whether, based on
18 their actions, what they did, they're victims here. I don't
19 think it merits too much more discussion.

20 But I do want to talk about one thing. Counsel for
21 McMahon went one step further. He argued that Xu Jin and his
22 family didn't suffer substantial emotional distress and I want
23 to stop and say that the law only requires us to show that the
24 intent was to cause substantial emotional distress, whether or
25 not you are actually distressed.

Rebuttal - Heeren

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1 But be that as it may, the argument was, well, were
2 they really upset by this? They sent the father back to
3 China. Think about the testimony you heard. You're the
4 people who assess it. You determine its credibility. Think
5 about how upset each of those victims were when they testified
6 before you. I know it was at the beginning of the case, but
7 think about how Liu Yan talked about what she saw in her
8 sister after all this had happened, her withdrawal from her
9 family, from society, how upset that made her. Think about
10 how upset Liu Fang was as she described the toll it had taken
11 on her life and her family. And this incredible, incredible
12 claim that the decision to let their father return to China
13 with the PRC officials that were sent as minders was somehow
14 proof that they were not distressed.

15 You heard evidence of why they did that. Go back to
16 that testimony. They told you, their father's wife, the
17 grandmother, was still in China. Xu Jin's sister, that man's
18 daughter, was there and they were threatening to throw her
19 back in prison if he did not return. Think about the
20 incredible, heart-rending stress of that situation for Xu Jin
21 and their family.

22 Think about the dilemma; well, I don't want my
23 father going back with these people, but I know they have my
24 grandmother -- I know they have my mother and my sister.
25 Think about the choice for the father. Does anyone seriously

Rebuttal - Heeren

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1 believe they wanted that choice? Why do you think they just
2 sent Xu Jin's father? This wasn't a family trip for a reason.
3 Just the father. Leave the mother behind. Leave the sister
4 behind. Because they are forcing their return. The notion
5 that the victims did not suffer distress from this situation
6 or that it was not intended by this scheme is just without
7 merit.

8 You know, you think it should go without saying, but
9 given the facts of this case and what the defendants did, it
10 apparently needs to be said aloud. A person living in the
11 United States should not have to live in fear that they will
12 receive a knock at the door and discover that their elderly
13 family member has been forced to travel around the world by a
14 large group of men and women. A person living in the United
15 States should not have to live in fear that strangers will try
16 to enter their home and leave a note threatening the safety of
17 their wife and child. A person living in the United States
18 should not have to live in fear that men working for a foreign
19 government will try to force him to leave his home, leave his
20 family, and travel to another country against his will.

21 The three defendants before you helped a foreign
22 government to work outside the U.S. system to talk and to
23 harass the victims in the hope of using fees to coerce their
24 return to China. The defendants are responsible for their
25 conduct and that conduct was illegal.

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1 Now, unlike the victims that the defendants stalked
2 for the Chinese government outside of the U.S. system, the
3 defendants in this case have been given their due process.
4 We've reached the end of the criminal justice process where
5 the defendants have had a fair trial. Now it's time for them
6 to be held accountable for their actions, for terrorizing the
7 people you saw here at the direction of the Chinese
8 government.

9 Ladies and gentlemen, find these defendants guilty.
10 Not because I say they're guilty, not because my colleagues
11 say they're guilty, but because the facts, the evidence,
12 proves they are guilty beyond a reasonable doubt. Find the
13 defendants guilty because they are guilty.

14 Thank you for your time.

15 JURY CHARGE

16 BY THE COURT:

17 THE COURT: Thank you very much, Mr. Heeren.

18 So, Ladies and Gentlemen, I am now going to instruct
19 you on the law. We are also going to have the charge
20 projected on the overhead so you can read along. And my
21 philosophy, if I have not said this before in the trial,
22 though I think I did, is the trip always seems a little
23 shorter if you know where you are going. So, the total number
24 of pages is 42 and let me say this, the law requires that I
25 read it into the record. Because you will be getting a

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1 hardcopy so you may wonder to yourself, why do I need to read
2 it to you then, because you are all capable of reading? But I
3 am required to read it into the record and to you to ensure
4 that you actually hear the instructions that you will receive
5 in paper as well. Okay.

6 So, Ladies and Gentlemen of the Jury, now that you
7 have heard all of the evidence in the case as well as the
8 arguments of the lawyers -- and again, my apologies to the
9 folks here that I cannot see you while I am doing this -- it
10 is my duty to give you instructions as to the law applicable
11 in this case. We are all grateful to you for the close
12 attention you have given to this case thus far. I ask that
13 you continue to do so as I give you these instructions. You
14 will be receiving a paper copy of these instructions for use
15 during your deliberations and you may request multiple copies
16 as well. But be considerate of the trees.

17 The defendants Michael McMahon, Zheng Congying and
18 Zheng Yong are charged with conspiracy to act as agents of a
19 foreign government, acting a agents of a foreign government,
20 conspiracy to engage in interstate stalking, and interstate
21 stalking. The defendants have pleaded not guilty to these
22 charges and are presumed innocent.

23 My instructions will be in three parts:

24 First, I will instruct you regarding the general
25 rules that define and govern the duties of a jury in a

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1 criminal case such as this;

2 Second, I will instruct you as to the particular
3 crimes charged in this case and the specific elements the
4 Government must prove with respect to each crime, and;

5 Third, I will give you some general rules regarding
6 your deliberation.

7 That actually should be deliberations. It could be
8 either, but we'll go with deliberations.

9 So I am not going to read the table of contents,
10 that is merely there for your ease of reference.

11 Turning now to the general instructions: Role of
12 the Court and jury.

13 Let me start by restating our respective roles as
14 Judge and jury.

15 Your duty, as I mentioned in my opening
16 instructions, is to find the facts from all of the evidence in
17 this case. You are the sole judges of the facts, and it is
18 for you and you alone to determine what weight to give the
19 evidence, to resolve such conflicts as may have appeared in
20 the evidence, and to draw such inferences as you deem to be
21 reasonable and warranted from the evidence.

22 My job is to instruct you on the law. You must
23 apply the law in accordance with my instructions, as to the
24 facts as you find them. Sorry -- to the facts as you find
25 them.

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1 And let me say this: I unfortunately cannot read it
2 any faster than I am because we do have a court reporter and
3 translators who need to be able to do their jobs as I read.
4 Okay.

5 I remind you of your sworn obligation to follow the
6 law as I describe it to you, whether you agree with it or not.
7 You should not be concerned about the wisdom of any rule of
8 law that I state: Regardless of any opinion you may have
9 about what the law may be -- or should be -- it would be a
10 violation of your oaths as jurors to base your verdict upon
11 any other view of the law than the one given to you in these
12 instructions.

13 If any of the lawyers have stated a legal principle
14 that differs from any that I state to you in my instructions,
15 you must be guided solely by what I instruct you about the
16 law. You should not single out any one instruction as alone
17 stating the law, but should consider my instructions as a
18 whole.

19 Since it is your job -- not mine -- to find the
20 facts, I have neither expressed, nor attempted to intimate an
21 opinion about how you should decide the facts of this case.
22 You should not consider anything I have said or done in the
23 course of the trial, including these instructions, as
24 expressing any opinion about the facts or the merits of this
25 case. This includes sustaining or overruling objections. For

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1 example, on occasion, I may have asked questions of a witness.
2 You should attach no special significance to these questions
3 simply because they were asked by me.

4 The defendants have been charged in an Indictment
5 with violating Federal laws. The Indictment is merely a
6 statement of the charges against the defendants. The
7 Indictment is not itself evidence, nor does it create an
8 inference of guilt. As previously stated, the defendants have
9 entered a plea of not guilty to the charges against them in
10 the Indictment.

11 You must determine the facts in this case based
12 solely on the evidence presented, or those inferences which
13 can reasonably be drawn from the evidence presented. Evidence
14 has been presented to you in the form of sworn testimony from
15 witnesses and documentary Exhibits that have been received in
16 evidence by me.

17 There are rules of evidence that control what can be
18 received into evidence. When a lawyer asks a question or
19 offers an Exhibit into evidence, and a lawyer on the other
20 side thinks that it is not permitted by the rules of evidence,
21 that lawyer may object -- which you, of course, saw and heard
22 during the trial. This simply meant that the lawyer wanted me
23 to make a decision on a particular rule of evidence. Lawyers
24 have a duty to their client to object when they believe
25 something is improper under the rules of evidence. You should

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1 not be influenced by the objection itself. If I sustained an
2 objection, you must ignore the question or Exhibit and must
3 not try to guess what the answer might have been or the
4 Exhibit might have contained. If I overruled the objection
5 and the evidence was admitted, you should consider it like any
6 other evidence, but should not give it special attention
7 simply because of the objection. Furthermore, as I will also
8 instruct you later, certain evidence was admitted only for a
9 limited purpose.

10 Certain things are not evidence and are to be
11 entirely disregarded by you in deciding what the facts are:
12 The Indictment; arguments, statements, or summations by the
13 lawyers; objections to the questions or to the offered
14 Exhibits, and; any testimony that has been excluded, stricken,
15 or that you have been instructed to disregard.

16 As I mentioned in my opening instructions, there
17 are, generally speaking, two types of evidence, direct and
18 circumstantial. You may use both types of evidence in
19 reaching your verdict in this case. There is no distinction
20 between the weight to be given to these two types of evidence.
21 You must base your verdict on a reasonable assessment of all
22 of the evidence in the case.

23 Direct evidence is testimony from a witness about
24 something he or she knows by virtue of his or her own
25 senses -- something he or she has seen, felt, touched, tasted,

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1 or heard.

2 The other type of evidence -- circumstantial
3 evidence -- is proof of a chain of circumstances that points
4 to the existence or nonexistence of certain facts. A simple
5 example of circumstantial evidence is as follows: And
6 Mr. Lustberg did talk about this -- suppose you came to court
7 on a day when the weather was clear, sunny and dry, just like
8 today. However, after several hours in the courtroom where
9 there are no windows, you observe a person come in wearing a
10 wet raincoat and another person shaking a wet umbrella.
11 Without you ever looking outside, you would not have direct
12 evidence that it rained, but you might infer from these
13 circumstances that while you were sitting in court, it rained
14 outdoors.

15 That is all it there is to circumstantial evidence.
16 On the basis of reason, experience, and common sense, you
17 infer the existence or nonexistence of a fact from one or more
18 established facts.

19 You are permitted to draw, from the facts that you
20 find to have been proved, such reasonable inferences as would
21 be justified in light of your experience. Inferences are
22 deductions or conclusions that reason and common sense lead
23 you, the jury, to draw from the facts that have been
24 established by the evidence in the case. Use your common
25 sense in drawing inferences; however, you are not permitted to

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1 engage in mere guesswork or speculation.

2 There are times when differing inferences may be
3 drawn from facts, whether proved by direct or circumstantial
4 evidence. Perhaps the Government asks you to draw one, and
5 the defendant asks you to draw another. It is for you, and
6 you alone, to decide what inferences you will draw.

7 No significance should be attached to the fact that
8 a document, other Exhibit, or witness testimony was introduced
9 by one party rather than by the other. Any party is entitled
10 to the benefit of any evidence tending to establish its
11 contentions, even though such evidence may have come from
12 witnesses or documents introduced by another party.

13 In deciding what the facts are in this case, you
14 must consider all of the evidence that has been offered. In
15 doing this, you must decide which testimony to believe and
16 which testimony not to believe. You are the sole judges of
17 credibility of the witnesses and the weight their testimony
18 deserves. Your determination of the issue of credibility very
19 largely must depend upon the impression that a witness made
20 upon you as to whether or not that witness was telling the
21 truth or giving you an accurate version of what occurred. You
22 may choose to disbelieve all or part of any witness's
23 testimony. In deciding whether and to what extent to believe
24 a witness's testimony, you may take into account any number of
25 factors, including the following:

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1 The witness's opportunity to see, hear, and know
2 about the events he or she described;

3 The witness's ability to recall and describe those
4 things;

5 The witness's manner in testifying -- was the
6 witness candid and forthright or did the witness seem as if he
7 or she was hiding something, being evasive, or suspect in some
8 way;

9 How the witness's testimony on direct examination
10 compared with how the witness testified on cross-examination
11 examination;

12 The reasonableness of the witness's testimony in
13 light of all of the other evidence in the case;

14 Whether the witness had any possible bias, any
15 relationship to a party, any motive to testify falsely, or any
16 possible interest in the outcome of the trial, and;

17 Whether the witness's testimony was contradicted by
18 his or her other testimony, by what that witness said or did
19 on a prior occasion, by the testimony of other witnesses, or
20 by other evidence.

21 Inconsistencies or discrepancies in the testimony of
22 a witness, or between the testimony of different witnesses,
23 may or may not cause you to discredit such testimony. In
24 weighing the effects of a discrepancy, you should consider
25 whether it pertains to a matter of importance or an

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1 unimportant detail, and whether the discrepancy results from
2 an innocent error or intentional falsehood.

3 If you find that any statement by a witness on the
4 stand is false, in whole or in part, you may disregard the
5 particular part you find to be false or you may disregard his
6 or her entire testimony as not worthy of belief.

7 The defendants did not testify in this case. Under
8 our Constitution, they have no obligation to testify or to
9 present any other evidence because it is the Government's
10 burden to prove their guilt beyond a reasonable doubt. A
11 defendant is never required to prove that he is innocent.

12 You may not attach any significance to the fact that
13 the defendants did not testify, nor may you draw any adverse
14 inference against the defendants because they did not take the
15 witness stand. In your deliberations in the jury room, you
16 may not consider this decision against the defendants in any
17 way.

18 During the trial, you heard testimony from current
19 and former law enforcement officers. The fact that a witness
20 is or was employed as a law enforcement official does not mean
21 that his or her testimony is deserving of more or less
22 consideration or greater or lesser weight than that of an
23 ordinary witness. It is for you to decide, after weighing all
24 the evidence and in light of the instructions I have given you
25 about the factors relevant to determining the credibility of

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1 any witness, whether to accept the testimony of a law
2 enforcement witness, and what weight, if any, that testimony
3 deserves.

4 In this case, I have permitted certain witnesses to
5 express their opinions about matters that are in issue. A
6 witness may be permitted to testify to an opinion on those
7 matters about which he or she has special knowledge, skill,
8 experience and training. Such testimony is presented to you
9 on the theory that someone who is experienced and
10 knowledgeable in the field can assist you in understanding the
11 evidence or in reaching an independent decision on the facts.

12 In weighing that opinion testimony, you may consider
13 the witness's qualifications, his or her opinions, the reason
14 for testifying, as well as all of the other considerations
15 that ordinarily apply when you are deciding whether or not to
16 believe a witness's testimony. You may give the opinion
17 testimony whatever weight, if any, you find it deserves in
18 light of all the evidence in this case. You should not,
19 however, accept opinion testimony merely because I allowed the
20 witness to testify concerning his or her opinion, nor should
21 you substitute it for your own reason, judgment and common
22 sense. The determination of the facts in this case rests
23 solely with you.

24 During this trial, you have heard argument about
25 "cooperating witnesses" and whether you should believe them or

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1 not. The Government argues, as it is permitted to do, that it
2 must take the witnesses as it finds them, and experience will
3 tell you that the Government sometimes must rely on the
4 testimony of a witness who admits to participating in criminal
5 activity to show criminal behavior by others. For that
6 reason, the law allows the use of accomplice and coconspirator
7 testimony. Indeed, it is the law in Federal Court that such
8 testimony may be enough, standing alone, for conviction if the
9 jury finds that the testimony establishes guilt beyond a
10 reasonable doubt.

11 However, it is also the case that cooperator
12 testimony is of such a nature that it must be scrutinized with
13 great care and viewed with particular caution when you decide
14 how much of that testimony, if any, to believe. I have given
15 you some general considerations on credibility, and I will not
16 repeat them all here. Instead, I will say a few things that
17 you may want to consider during your deliberations on the
18 subject of cooperating witnesses.

19 You should ask yourselves whether these witnesses
20 would benefit more by lying or telling the truth. Was their
21 testimony made up in any way because they believed or hoped
22 they would how receive favorable treatment by testifying
23 falsely? Or did they believe their interests would be served
24 by testifying truthfully? If you believe a witness was
25 motivated by hopes of personal gain, was this motivation one

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1 that would cause him to lie or would cause him or her to tell
2 the truth? Did this motivation color his or her testimony at
3 all?

4 You have heard evidence that a Government witness
5 has pleaded guilty to charges arising out of some of the same
6 facts that are at issue in this case. That evidence is before
7 you solely to assist you in evaluating the credibility of that
8 witness. You are instructed that you are to draw no
9 conclusions or inferences of any kind about the guilt of the
10 defendants on trial before you from the fact that a
11 prosecution witness pleaded guilty to crimes. The decision of
12 that witness to plead guilty was a personal decision that
13 witness made about his own guilt. It may not be used by you
14 in any way as evidence against or unfavorable to the
15 defendants.

16 Finally, in relation to cooperating witnesses, you
17 have also heard testimony in this case about who will decide
18 the sentence of such a witness. The question of punishment of
19 a cooperating witness is a duty that rests exclusively upon
20 the sentencing court, and you should not think about that
21 except as it may affect the witnesses credibility.

22 There was testimony at trial that the attorneys and
23 agents for the Government interviewed witnesses when preparing
24 for and during the course of the trial. You should not draw
25 any unfavorable inference from that testimony. Attorneys have

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1 an obligation to prepare their case as thoroughly as possible
2 and, in the discharge of that responsibility, to interview
3 witnesses. However, you may consider the frequency and
4 duration of these preparation sessions, and the impact they
5 may have had on the witness's testimony, in evaluating the
6 credibility of the witness.

7 Although the Government bears the burden of proof
8 beyond a reasonable doubt, and although a reasonable doubt can
9 arise from lack of evidence, you are instructed that there is
10 no legal requirement that the Government use any specific
11 investigative techniques or pursue every investigative lead to
12 prove its case. Therefore, although you are to carefully
13 consider the evidence adduced by the Government, you are not
14 to speculate as to why they used the techniques they did or
15 why they did not use other techniques.

16 Additionally, the law does not require that all
17 things mentioned during the course of the trial be produced as
18 Exhibits. Your concern is to determine whether or not, on the
19 evidence or lack of evidence, a defendant's guilt has been
20 proved beyond a reasonable doubt.

21

22 (Continued on following page.)

23

24

25

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1 (Continuing)

2 THE COURT: In this regard, I also charge you that
3 all persons who may have been present at any time or place
4 mentioned in the case, or who may appear to have some
5 knowledge of the issues in this case need not be called as
6 witnesses. There is no duty on either side, however, to call
7 a witness whose testimony would be merely cumulative of
8 testimony already in evidence, or who would merely provide
9 additional testimony to facts already in evidence. I remind
10 you, however, that because the law presumes that each
11 defendant is innocent, the burden of proving his guilt beyond
12 a reasonable doubt is on the Government throughout the trial.
13 Defendants do not have the burden of proving their innocence
14 or of producing any evidence or calling any witnesses at all.

15 During the trial in this case, you have heard
16 evidence concerning a variety of investigative techniques and
17 methods of collecting evidence. Evidence was properly
18 admitted in this case and may be considered by you. I
19 instruct you that any evidence that was presented to you was
20 obtained legally and you must give the evidence -- sorry --
21 must give the evidence consideration along with all the other
22 evidence in this case in determining whether the Government
23 has proved each of the defendants guilt beyond a reasonable
24 doubt.

25 During the trial, you have heard from some witnesses

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1 who testified in Mandarin or Cantonese, and whose testimony
2 was translated into English. You have also been shown
3 documents that were partially or entirely written in Chinese,
4 and you were provided with English translations of those
5 documents or portions of documents. The interpreters
6 translated the witness' testimony and the parties agreed on
7 the English translations of the documents, recordings and
8 records. Chinese-to-English translations of that evidence
9 have been admitted into evidence. All jurors must consider
10 the same evidence. If any of you speak Mandarin or Cantonese
11 or read Chinese, you must base -- you must all base your
12 decision on the evidence presented in the English translation.
13 These translations are evidence, not just guides, and I
14 instruct you to consider them just like any other evidence in
15 this case.

16 The parties presented certain evidence in the form
17 of charts and summaries. These charts and summaries were
18 shown to you in order to make the other evidence more
19 meaningful and to aid you in considering the evidence. They
20 are no better than the documents about which they are based
21 and are not themselves independent evidence. Therefore, you
22 are to give no greater consideration to these charts or
23 summaries than you would give to the evidence upon which they
24 are based. It is for you to decide whether the charts,
25 schedules, or summaries correctly present the information

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1 contained in the testimony and in the exhibits on which they
2 are based. You are entitled to consider the charts,
3 schedules, and summaries if you find that they are of
4 assistance to you in analyzing and understanding the evidence.

5 The Government has been permitted to distribute or
6 use transcripts, some in the form of subtitles, containing the
7 Government's interpretation of what was said on audio or video
8 recordings that were received into evidence. Those
9 transcripts were provided to you as an aid or guide to assist
10 you in listening to the recordings. However, they are not in
11 and of themselves evidence, and the versions of the video
12 recordings containing subtitles were not admitted as evidence.
13 You alone should decide what appears on the recordings based
14 on what you heard. If you think you heard something
15 differently than it appeared on the transcript, then what you
16 heard controls.

17 A stipulation is an agreement among the parties that
18 a certain fact is true. You should regard such agreed facts
19 as true.

20 During the trial, you have heard evidence about the
21 involvement of other persons in the events related to this
22 case. You may not draw any inference, favorable or
23 unfavorable, toward the Government or the defendants from the
24 fact that a certain person or people are not on trial before
25 you. Your certain concern is solely the defendants on trial

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1 before you. You should neither speculate as to the reason
2 these people are not on trial before you or allow their
3 absence as parties to influence in any way your deliberations
4 in this case.

5 During the trial in this case, I admitted particular
6 items of evidence for a limited purpose. This evidence can be
7 considered by you only for that particular purpose and not for
8 any other purpose.

9 Throughout this trial, there have also been
10 references to alleged crimes committed by Xu Jin, X-U J-I-N,
11 and/or his family members in the People's Republic of China,
12 which I will also refer to in these instructions as China.
13 Whether these crimes were committed or not has no bearing on
14 the case before you, and you should not consider or speculate
15 about the merits of these allegations.

16 Finally, the Government has argued that some of the
17 conduct that -- you know what, Kate, we should remove that
18 "finally."

19 The Government has argued that some of the conduct
20 that Mr. McMahon engaged in allegedly as part of the crimes
21 charged in this case may have also violated other law, namely,
22 violating a user agreement and privacy laws in connection with
23 certain databases. Mr. McMahon is not charged with any
24 offenses as a result of these violations and evidence that he
25 may have violated this or any other laws, including tax laws,

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1 was admitted for a limited purpose, and you should only
2 consider that evidence in deciding whether Mr. McMahon had the
3 requisite intent to commit the crimes charged in the
4 indictment, and for no other purpose.

5 Finally, on cross-examination, Mr. Gallowitz was
6 asked about certain Civilian Complaint Review Board
7 proceedings with regard to Mr. McMahon. Those proceedings
8 were only raised in the context of assessing Mr. Gallowitz's
9 opinion of Mr. McMahon and can only be considered by you in
10 evaluating that opinion.

11 Both the Government and the defense have the same
12 right to subpoena witnesses to testify on their behalf. There
13 is no duty on either side, however, to call a witness whose
14 testimony would be merely cumulative of testimony already in
15 evidence, or who would merely provide additional testimony to
16 facts already in evidence.

17 I remind you, however, that because the law presumes
18 the defendants to be innocent, the burden of proving the
19 defendants's guilt beyond a reasonable doubt is on the
20 Government throughout the trial. The defendants never have
21 the burden of proving their innocence or of producing any
22 evidence or calling any witnesses at all.

23 As I will instruct you momentarily, the indictment
24 contains several different counts or charges against each of
25 the defendants. You must consider each count separately and

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1 return a separate verdict of guilty or not guilty for each
2 count. Whether you find a defendant guilty or not guilty as
3 to one count should not affect your verdict as to any of the
4 other charged counts. Although the Defendants have been
5 charged together and are being tried together, you must
6 evaluate the evidence against each Defendant individually and
7 determine whether each Defendant is not guilty or guilty on a
8 particular count individually.

9 In determining the issues of fact and rendering a
10 verdict in this case, you should perform your duty with
11 complete impartiality and without bias, sympathy, or prejudice
12 as to any party. All parties are equal before the law and are
13 entitled to the same fair consideration. Relatedly, it would
14 be improper for you to consider, in reaching your decision as
15 to whether the Government has sustained its burden of proof,
16 any personal feelings you may have about the Defendants' race,
17 religion, national origin, sex, or age. It would be equally
18 improper for you to allow any feelings you might have about
19 the nature of the crime charged to interfere with your
20 decision-making process.

21 The fact that this prosecution is brought in the
22 name of the United States of America entitles the Government
23 to no greater consideration than that accorded to any other
24 party to a litigation. By the same token, the Government is
25 also entitled to no less consideration. All parties, whether

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1 the Government or individuals, are equal before the law. The
2 Court expects that you will carefully and impartially consider
3 all of the evidence, follow the law as it is now being given
4 to you and reach a just verdict, regardless of the
5 consequences.

6 The question of punishment of the Defendants is of
7 no concern to the jury and should not, in any sense, enter
8 into or influence your deliberations. The duty of imposing a
9 sentence rests exclusively upon the Court. Your duty is to
10 weigh the evidence in the case and determine whether or not
11 each Defendant is guilty beyond a reasonable doubt, solely
12 upon the basis of such evidence. Under your oath as jurors,
13 you cannot allow a consideration of the punishment that may be
14 imposed upon the Defendants, if they are convicted, to
15 influence your verdict in any way or in any sense enter into
16 your deliberations.

17 I will now give specific instructions regarding the
18 presumption of innocence and the burden of proof in this case.

19 So, ladies and gentlemen, now we're on page 14,
20 which means we are a third of the way through the
21 instructions.

22 If at any point, though, needs a nature break, just
23 raise your hand, or any other kind break.

24 I will also note at this time that I'm not reading
25 the headings that are in the instructions, but obviously they

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1 are there for purely or primarily organizational purposes.

2 The Defendants have pleaded not guilty to the
3 charges in the indictment. To convict the Defendants, the
4 burden is on the Government to prove each Defendant's guilt of
5 each element of each charge beyond a reasonable doubt. This
6 burden never shifts to the Defendants, for the simple reason
7 that the law presumes the Defendants to be innocent and never
8 imposes upon the Defendants in a criminal case the burden or
9 duty of calling any witness or producing any evidence.

10 In other words, the Defendants start with a clean
11 slate and are presumed innocent of each charge until such
12 time, if ever, that you as a jury are satisfied that the
13 Government has proven that a particular Defendant is guilty of
14 a given charge beyond a reasonable doubt.

15 You may be wondering what constitute a reasonable
16 doubt. The words almost define themselves. It is a doubt
17 based upon reason. It is a doubt that a reasonable person has
18 after carefully weighing all of the evidence. It is a doubt
19 that would cause a reasonable person to hesitate to act in a
20 matter of importance in his or her personal life. Proof
21 beyond ea reasonable doubt must, therefore, be proof that is
22 so convincing that a reasonable person, based on that proof,
23 would not hesitate to rely upon it in making an important
24 decision.

25 A reasonable doubt is not caprice or whim. It is

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1 not speculation or suspicion. It is not an excuse to avoid
2 the performance of an unpleasant duty. The law does not
3 require that the Government prove guilt beyond all possible
4 doubt. Proof beyond a reasonable doubt is sufficient to
5 convict.

6 If, after fair and impartial consideration of all
7 the evidence, you are satisfied beyond a reasonable doubt of a
8 Defendant's guilt with respect to a particular charge against
9 him, you should find that Defendant guilty of that charge. On
10 the other hand, if after fair and impartial consideration of
11 the evidence, you have a reasonable doubt as to a Defendant's
12 guilt with respect to a particular charge against him, you
13 must find that Defendant not guilty of that charge.

14 All right. We are on page 7 now.

15 I will now turn to the second part of my
16 instructions and instruct you as to the legal elements of the
17 criminal counts the Government has alleged.

18 The indictment charges "in or about" and "on or
19 about" and "between" certain dates. The proof need not
20 establish with certainty the exact date of an allege offense.
21 It is sufficient if the evidence establishes beyond a
22 reasonable doubt that an offense was committed on a date
23 reasonably near the dates alleged.

24 Because all four charges in the indictment against
25 the Defendants require you to consider the concept of

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1 knowledge and intent, I will instruct you about those concepts
2 before addressing each of the charges specifically.

3 A person acts knowingly if he acts purposefully and
4 voluntarily, and not because of ignorance, mistake, accident
5 or carelessness. Whether the Defendants acted knowingly may
6 be proven by their conduct and by all of the facts and
7 circumstances surrounding the case.

8 A person acts intentionally when he acts
9 deliberately and purposefully. That is, the defendants's acts
10 must have been the product of their conscious, objective
11 decision, rather than the product of mistake or accident. You
12 may infer that a person ordinarily intends all natural and
13 probable consequence of an act knowingly done. It is
14 sufficient that a Defendant intentionally engages in conduct
15 that the law forbids. The Defendants need not have been aware
16 of the specific law that their conduct may have violated.

17 In determining whether a Defendant acted knowingly,
18 you may also consider whether the Defendant deliberately
19 closed his eyes to what otherwise would have been obvious to
20 him. If you find beyond a reasonable doubt that the
21 Defendants you are considering acted, let's mark that the
22 Defendant you are considering, acted with or that the
23 defendants's floor positive in nor rans was solely and
24 entirely the result of a conscious purpose of avoid learning
25 the truth, then this element maybe satisfied, however guilty

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1 knowledge may not be established by demonstrating that the
2 Defendant was merely neglect, foolish or mistaken. It is
3 entirely up to you whether you find that the Defendant
4 deliberately closed his eyes and any inferences to be drawn
5 from the evidence on this issue.

6 The issues of knowledge and intent require you to
7 make a determination about a defendant's state of mind,
8 something that can rarely be proved directly. Willful intent
9 or guilty knowledge may be inferred from the secretive or
10 irregular manner in which a transaction is carried out. A
11 wise and careful consideration of all of the circumstances
12 shown by the evidence and the exhibits in the case may,
13 however, permit you to make a determination as to the
14 Defendant's state of mind. Indeed, experience has taught that
15 frequently actions speak louder and more clearly than words,
16 and in your everyday affairs, you are frequently called upon
17 to determine a person's state of mind from their words and
18 actions in given circumstances. You are asked to do the same
19 here.

20 The Defendants are formally charged in an
21 indictment. As I instructed you at the outset of the case, an
22 indictment is simply a charge or accusation. You will not be
23 provided a copy of the indictment itself, because an
24 indictment is merely a statement of the charges and not
25 evidence itself.

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1 The indictment in this case contains four separate
2 counts, or separate offenses, and you will be called upon to
3 render a separate verdict on each of them as to each
4 Defendant. I will go over them in detail, but let me
5 summarize them now.

6 Count One charges each of the Defendants with
7 conspiracy to act as agents of a foreign government without
8 prior notification to the Attorney General of the United
9 States.

10 Count Two charges each of the Defendants with -- why
11 don't we get rid of that second "each" -- with acting as
12 agents of a foreign government without prior notification to
13 the Attorney General of the United States.

14 Count Three charges each of the Defendants with
15 conspiracy to engage in interstate stalking.

16 Count Four charges each of the Defendants with --
17 again, remove the "each" -- with engaging in interstate
18 stalking.

19 You must consider each count of the indictment and
20 each Defendant's alleged involvement in that count separately,
21 and you will be called upon to render a separate verdict on
22 each count for each Defendant. Whether you find a Defendant
23 guilty or not guilty as to one offense should not affect your
24 verdict as to any other counts.

25 There is one last point I want to make about the

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1 indictment. The indictment uses the word "and" and where my
2 instructions -- sorry -- where my instruction will use the
3 word "or." Can we change it to whereas? Whereas my
4 instructions will use the word "or." This is a result of how
5 the Government formalizes its charges, and it is not a
6 statement of the law. Where my instructions use the word
7 "or," that "or" is controlling over any other contradictory
8 phrasing in the indictment.

9 Counts One and Three of the indictment allege that
10 the Defendants participated in criminal conspiracy.

11 A conspiracy is an agreement by two or more persons
12 to accomplish some unlawful purpose. It is sometimes referred
13 to as a criminal partnership. The crime of conspiracy is an
14 offense separate from the crime the alleged conspirators
15 intended to commit. A conspiracy is in and of itself a crime.
16 If a conspiracy exists, even if it fails to achieve its
17 purpose, it is still a punishable crime. In order to prove
18 the crime of conspiracy charged in Counts One and Three of the
19 indictment, the Government must establish the following three
20 elements of the crime beyond a reasonable doubt:

21 First, two or more persons entered into the
22 particular unlawful agreement charged in the indictment;
23 second, the Defendant knowingly and intentionally became a
24 member of the conspiracy; and third, that an overt act was
25 committed in furtherance of the conspiracy.

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1 The first element requires that the Government prove
2 that at least two to conspirators had a meeting of the minds,
3 and that they agreed to work together to accomplish the act of
4 the charged conspiracy.

5 To establish a conspiracy, the Government is not
6 required to prove that the alleged members of the conspiracy
7 met together and entered into any express or formal agreement.
8 Similarly, you need not find that the allege conspirators
9 stated in words or writing what the scheme was, its object or
10 purpose, or every precise detail of the scheme or the means by
11 which its object or purpose was to be accomplished. What the
12 Government must prove is that there was a mutual
13 understanding, either spoken or unspoken, between two or more
14 people to accomplish an unlawful act by means of a joint plan
15 or common scheme. You may find that the existence of an
16 agreement to disobey or violate the law has been established
17 by direct proof. Because conspiracy is usually characterized
18 by secrecy, you may also infer its existence from the
19 circumstances and the conduct of the parties and others
20 involved. You may consider the actions and statements of all
21 of these person in deciding whether a common design existed to
22 act together for the accomplishment of an unlawful purpose.

23 The second element requires that the Government
24 prove beyond a reasonable doubt that the Defendant knowingly
25 and intentionally became a member of the charged conspiracy.

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1 I have already instructed you as to the terms knowingly and
2 intentionally. In deciding whether the Defendants were
3 participants in or members of a conspiracy, you must consider
4 whether, based upon all of the evidence, the Defendant you are
5 considering knowingly and intentionally joined that
6 conspiracy; that is, they participated in it with knowledge of
7 its purpose and with the specific intention of furthering one
8 or more of its objectives. Proof of a financial interest in
9 the outcome of a scheme is not essential, although if you find
10 that the Defendant did have a financial interest in the
11 outcome of a scheme, you may consider that as evidence of the
12 defendant's motive to join the conspiracy.

13 A defendant's knowledge is a matter of inference
14 from the facts proved. To become a member of a conspiracy, a
15 defendant need not have known the identities of every member
16 of the conspiracy, nor need they have been apprised of all of
17 their activities. A defendant need not have been fully
18 informed of all of the details or the scope of the conspiracy
19 in order to justify an inference of knowledge on his part. A
20 defendant need not have joined in all of the conspiracy's
21 unlawful objectives.

22 So, now, ladies and gentlemen, we are going to the
23 second half of the instructions. We're at page 22.

24 The extent of a defendant's participation has no
25 bearing on the issue of a defendant's guilt. A conspirator's

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1 liability is not measured by the extent or duration of his
2 participation. Indeed, each member may perform separate and
3 distinction acts and may perform them at different times.
4 Some conspirators play major roles, while others play minor
5 parts in the scheme. An equal role is not what the law
6 requires. In fact, even a single act may be sufficient to
7 draw the Defendant you are considering within the circle of
8 the conspiracy.

9 I want to caution you, however, that a defendant's
10 mere presence at the scene of criminal activity or at
11 locations frequented by criminals does not by itself make him
12 a member of the conspiracy. Similarly, mere association with
13 one and/or more members of the conspiracy does not
14 automatically make a defendant a member. A person may know or
15 be friendly with a criminal without being a criminal himself.
16 Indeed, a person may be a criminal without being a member of
17 the charged conspiracy. Mere similarity of conduct or the
18 fact that the individuals may have assembled together and
19 discussed common aims and interests does not necessarily
20 establish proof of the existence of a conspiracy.

21 I further caution you that mere knowledge, without
22 participation, in the unlawful plan is not sufficient.
23 Furthermore, the fact that a person, without any knowledge
24 that a crime is being committed, merely happens to act in a
25 way that furthers the purposes or objectives of the conspiracy

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1 does not make that person a member. More is required under
2 the law. What is necessary is that a defendant must have
3 participated with knowledge of at least some of the purposes
4 or objectives of the conspiracy and with the intention of
5 aiding in the accomplishment of those unlawful ends.

6 In sum, to find the Defendant you are considering
7 guilty of conspiracy, you must find beyond a reasonable doubt
8 that, with an understanding of the unlawful nature of the
9 conspiracy, they intentionally engaged, advised, or assisted
10 in the conspiracy for the purpose of furthering an illegal
11 undertaking.

12 The third element requires that the Government prove
13 at least one overt act. An overt act is any action intended
14 to help the objective of the conspiracy. An overt need not
15 itself be a criminal act, but it must attribute to furthering
16 the conspiracy. It is not required that all of the overt acts
17 alleged in the indictment be proven, or that the overt act was
18 committed at precisely the time alleged in the indictment. It
19 is sufficient that if you are convinced beyond a reasonable
20 doubt that the overt act occurred at or about the time and
21 place stated. Similarly, you need not find that any of the
22 Defendants themselves committed the overt act. It is
23 sufficient for the Government to show that one of the
24 conspirators knowingly committed an overt act in furtherance
25 of the conspiracy, since, in the eyes of the law, such as act

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1 becomes the act of all of the members of the conspiracy.

2 A conspiracy is often referred to as a partnership
3 in crime. As in other types of partnerships, when people
4 enter into an conspiracy to accomplish an unlawful end, each
5 and every member becomes an agent for the other conspirators
6 in carrying out the conspiracy. Accordingly, the reasonably
7 foreseeable acts, declarations, statements, and omissions of
8 any member of the conspiracy, and in furtherance of the common
9 purpose of the conspiracy, are deemed, under the law, to be
10 the acts of all of the members and all of the members are
11 responsible for such acts, declarations, statements, and
12 omissions.

13 If you find beyond a reasonable doubt that the
14 Defendants were members of each of the two conspiracies
15 charged in the indictment, then any acts done or statements
16 made in furtherance of the conspiracy by persons also found by
17 you to have been members of that conspiracy at the time those
18 act were committed or statements were made -- sorry -- were
19 committed or statements were made may be considered against
20 the Defendants, so long as the acts or statements were
21 reasonably foreseeable to the Defendants. This is so even if
22 such acts were done and statements were made in the
23 Defendants' absence and without their knowledge.

24 However, before you may consider the statements or
25 acts of a co-conspirator in deciding the issue of the

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1 Defendants' guilt, you must first determine that the acts or
2 statements were made during the existence of and in
3 furtherance of the unlawful scheme. If the acts were done or
4 statements made by someone who you do not find to have been a
5 member of the conspiracy, or if they were not done or said in
6 furtherance of the conspiracy, they may not be considered by
7 you as evidence against the Defendants.

8 Counts Two and Four of the indictment allege that
9 the Defendants committed the crimes of acting as illegal
10 agents of a foreign government and interstate stalking. The
11 indictment also alleges that the Defendants aided and abetted
12 the commission of these particular crimes. Thus, even if you
13 find that the Government has not proven beyond a reasonable
14 doubt that the Defendant you are considering directly acted as
15 an agent of a foreign government in the United States without
16 notifying the Attorney General, or directly engaged in
17 interstate stalking, you must also consider whether the
18 Government has met its burden of proving that the Defendant --
19 of proving -- sorry -- the Defendants' guilt by considering
20 the Defendants' guilt under the aiding-and-abetting liability
21 theory.

22 Aiding and abetting is defined under federal law in
23 Title 18, United States Code, Section 2, which provides, in
24 pertinent part, the following:

25 Whoever commits an offense against the United States

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1 or aids, abets, counsels, commands, induces or procures the
2 commission of a crime is punishable as a principal. Under the
3 federal aiding and abetting statute, it is not necessary for
4 the Government to show that the Defendant himself physically
5 committed the crime with which he is charged in order for you
6 to find the Defendant guilty. A person who aids or abets
7 another to commit an offense is just as guilty of that offense
8 as if he committed it himself.

9 Accordingly, you may find the Defendant guilty of
10 the offense charged if you find beyond a reasonable doubt that
11 the Government has proven that another person actually
12 committed an offense with which the Defendant is charged, and
13 that the Defendant aided and abetted that person in the
14 commission of the offense.

15 As I have indicated, the first requirement is that
16 you find that another person has committed the crime charged.
17 No one can be convicted the aiding and abetting the criminal
18 act of another if no crime was committed by the other person
19 in the first place. But if you do find that a crime was
20 committed, then you must consider whether the Defendant aided
21 and abetted the commission of that crime.

22 To aid and abet another to commit a crime, a
23 defendant must do two things. First, he must knowingly
24 associate himself in some way with the crime, and second, he
25 must participate in the crime by doing some act to help make

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1 the crime succeed.

2 To establish that the Defendant you are considering
3 knowingly associated themselves with the crime, the Government
4 must establish that the Defendants knew and intended that the
5 crimes charged would be committed.

6 To establish that the Defendant participated in the
7 commission of the crime, the Government must prove that the
8 Defendant engaged in some affirmative act or overt -- sorry --
9 in some affirmative conduct or overt act for the specific
10 purpose of bringing about the crime. A defendant's mere
11 presence where a crime is being committed, even coupled with
12 the knowledge by a defendant that a crime is being committed,
13 is not sufficient to establish aiding and abetting. One who
14 has no knowledge that a crime is being committed or is about
15 to be committed, but inadvertently does something that aids in
16 the commission of that crime is not an aider or abettor. An
17 aider or abettor must know that the crime is being committed
18 and act in a way that is intended to bring about the success
19 of the criminal venture.

20 To determine whether the Defendant you are
21 considering aided and abetted the commission of the crime with
22 which he is charged, ask yourself these questions:

23 Did he participate in the crime charged as something
24 he wished to bring about?

25 Did he knowingly associate with the criminal

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1 venture?

2 Did he seek by his actions to make the criminal
3 venture succeed?

4 If he did, then the Defendant is an aider and
5 abettor, and therefore guilty of the offense. If, on the
6 other hand, your answer to any of these questions is "no,"
7 then the Defendant is not an aider and abettor, you must find
8 him not -- sorry -- and you must find him not guilty under
9 that theory.

10 Another way in which you should evaluate the guilt
11 of the Defendants for Counts Two and Four, even if you do not
12 find that the Government has satisfied its burden of proof
13 with respect to direct liability or aiding-and-abetting
14 liability, is called co-conspirator liability.

15 If you find beyond a reasonable doubt that the
16 Defendant you are considering was a member of the conspiracy
17 charged in Count One of the indictment, then you may, but are
18 not required, find that Defendant guilty of the substantive
19 crime charged against him in Count Two. Likewise, if you find
20 beyond a reasonable doubt that the Defendant you are
21 considering was a member of the conspiracy charged in Count
22 Three of the indictment, then you may, but are not required,
23 to find the Defendant guilty of the substantive crime charged
24 against him in Count Four. To do so, however, you must first
25 find beyond a reasonable doubt each of the following elements

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1 as to Counts Two and Four:

2 First, the subjective crime charged in Counts Two
3 and Four was committed by someone;

4 Second, the person or persons you find actually
5 committed the crime were members of the conspiracy you found
6 to have existed;

7 Third, the substantive crime was committed pursuant
8 to the common plan and understanding you found to exist among
9 the conspirators;

10 Fourth, the Defendant was a member of that
11 conspiracy at the time of the substantive -- at the time the
12 substantive crime was committed;

13 And fifth, the Defendant could have reasonably
14 foreseen that the substantive crime might be committed by his
15 co-conspirators.

16 If you find all five of these elements to exist
17 beyond a reasonable doubt, then you may find the Defendant
18 guilty of Counts Two and Four, even though he did not
19 personally participate in the acts constituting the crime or
20 did not have actual knowledge of it.

21

22 (Continued on next page.)

23

24

25

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1 (Continuing.)

2 THE COURT: The reason for this rule is simply
3 that a co-conspirator who commits a substantive crime
4 pursuant to a conspiracy is deemed to be the agent of the
5 other conspirators. Therefore, all of the co-conspirators
6 bear criminal responsibility for the commission of the
7 substantive crimes. If, however, you are not satisfied as
8 to the existence of any of these five elements, then you may
9 not find that defendant guilty of the substantive crime
10 unless the Government proves beyond a reasonable doubt that
11 the defendant personally committed the substantive crime
12 charged in Counts Two and Four, or aided and abetted the
13 commission of the substantive crime charged in Counts Two
14 and Four.

15 Defendant Zheng Congying has raised the defense
16 that he withdrew from the conspiracies charged in Counts One
17 and Three. Once a person joins a conspiracy, that person
18 remains a member until he withdraws from it. Any withdrawal
19 must be complete and it must be done in good faith. A
20 person can withdraw from a conspiracy by taking some
21 affirmative steps to terminate or abandon his participation
22 in and efforts to promote the conspiracy. In other words,
23 the defendant must have demonstrated some type of positive
24 action that disavowed or defeated the purpose of the
25 conspiracy. Proof that the defendant merely ceased

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1 conspiratorial activity is not enough.

2 Where a defendant, by his conspiratorial action,
3 sets in motion events that are designed to have effect
4 beyond the period of his active participation, the
5 defendants' affirmative act of withdrawal must be aimed at
6 weakening or undermining the foreseeable consequences of his
7 own participation in the conspiracy.

8 For example, a defendant may withdraw from a
9 conspiracy by giving a timely warning about the conspiracy
10 to proper law enforcement officials or wholly depriving his
11 prior efforts of effectiveness in the commission of the
12 crime or making appropriate efforts to prevent the
13 commission of a crime or by doing acts that are inconsistent
14 with the objects of the conspiracy and making reasonable
15 efforts to communicate those acts to his co-conspirators.

16 Defendant Zheng has the burden of proving that he
17 withdrew from the conspiracy by a preponderance of the
18 evidence. In determining whether defendant Zheng withdrew
19 from the conspiracy, you may consider the relevant testimony
20 of all of the witnesses regardless of who called them and
21 all the relevant exhibits received in evidence regardless of
22 who produced them. However, it is important to remember
23 that the fact that defendant Zheng has raised this defense
24 does not relieve the Government of its burden of proving
25 each and every element of the crime of conspiracy.

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1 In this case, defendants contend that the
2 Government's proof fails to show the existence of only one
3 overall conspiracy. Rather, they claim that there were
4 actually several separate and independent conspiracies with
5 various groups of members. Whether there existed a single
6 unlawful agreement or many such agreements, or, indeed, no
7 agreement at all, is a question of fact for you, the jury,
8 to determine in accordance with the instructions I am about
9 to give you.

10 When two or more people join together to further
11 one common unlawful design or purpose, a single conspiracy
12 exists. By way of contrast, multiple conspiracies exist
13 when there are separate unlawful agreements to achieve
14 distinct purposes. Proof of several separate and
15 independent conspiracies is not proof of the single overall
16 conspiracy charged in the indictment, unless one of the
17 conspiracies proved is the single conspiracy described in
18 the indictment.

19 You may find that there was a single conspiracy
20 despite the fact that there were changes in either personnel
21 or activities or both. The fact that the members of a
22 conspiracy may change does not necessarily imply that
23 separate conspiracies exist.

24 On the other hand, if you find that the conspiracy
25 charged in the indictment did not exist, you cannot find any

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1 defendant guilty of the single conspiracy charged in the
2 indictment. This is so even if you find that some
3 conspiracy other than the one charged in the indictment
4 existed, even though the purposes of both conspiracies may
5 have been the same and even though there may have been some
6 overlap in membership.

7 Similarly, if you find that a particular defendant
8 was a member of another conspiracy and not the one charged
9 in the indictment, then you must acquit the defendant of the
10 conspiracy charge. Therefore, what you must do is determine
11 whether the conspiracy charged in the indictment existed.
12 If it did, you then must determine the nature of the
13 conspiracy and who were its members.

14 Count One of the indictment charges that all three
15 defendants, Michael McMahon, Zheng Congying, and Zhu Yong,
16 also known as Jason Zhu, was conspiring to commit an offense
17 against the United States in violation of Title 18, United
18 States Code Section 371. Section 371 provides, in relevant
19 part, that:

20 If two or more persons conspire to commit an
21 offense against the United States, in any manner or for any
22 purpose, and one or more of such persons do any act to
23 effect the object of the conspiracy, each shall be guilty of
24 an offense against the United States.

25 The Government alleges that the object of the

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1 conspiracy was for Michael McMahon, Zheng Congying, and Zhu
2 Yong, also known as Jason Zhu, to act in the United States
3 as an agent of a foreign government without first notifying
4 the Attorney General, in violation of federal law.

5 Specifically, the indictment reads as follows:

6 In or about and between September 2016 and
7 December 2019, both dates being approximate and inclusive,
8 within the Eastern District of New York and elsewhere, the
9 defendants Michael McMahon, Zheng Congying and Zhu Yong,
10 also known as Jason Zhu, together with others did knowingly
11 and willfully conspire to act in the United States as agents
12 of a foreign government, to wit: The People's Republic of
13 China government, without prior notification to the Attorney
14 General of the United States, as required by law, contrary
15 to Title 18, United States Code Section 951(a).

16 I've already instructed you on the general
17 definition of "conspiracy," which, as I said, is an
18 agreement among two or more people to commit a crime. Here,
19 the alleged crime charged in Count One is acting in the
20 United States as an agent of a foreign government,
21 specifically the People's Republic of China, or China,
22 without notifying the Attorney General. I will next
23 instruct you on the particular elements of that such
24 substantive crime.

25 As a reminder, the Government need not prove that

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1 the defendants actually committed the unlawful act charged
2 as the object of the conspiracy in Count One. Rather, if
3 you find that the defendant you are considering knowingly
4 and intentionally agreed to commit this crime, then you
5 should find that defendant guilty of Count One.

6 I remind you that the crime of conspiracy, an
7 agreement to violate a law, is an independent offense. It
8 is separate and distinct from the actual violation of any
9 specific law. Accordingly, you may find the defendants
10 guilty of the offenses charged in Count One -- it should be
11 the offense charged in Count One -- even if you find that
12 there was no violation of Count Two.

13 As previously mentioned, the conspiracy charged in
14 Count One requires proof of at least one overt act. I will
15 not read the overt acts charged in the indictment, but you
16 will receive a copy of the overt acts alleged for Count One
17 of the indictment to review during your deliberations. As a
18 reminder, it is not required that all of the overt acts
19 alleged in the indictment be proven or that any overt act
20 was committed at precisely the time alleged in the
21 indictment, nor do I need to find that the defendant himself
22 committed the overt act. It is sufficient for the
23 Government to show that one of the conspirators knowingly
24 committed an overt act in furtherance of the conspiracy.

25 Count Two of the indictment charges that the

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1 defendants, Michael McMahon, Zheng Congying, and Zhu Yong,
2 also known as Jason Zhu, were acting as agents of a foreign
3 government without prior notification to the Attorney
4 General of the United States. The relevant language of the
5 statute, Title 18, United States Code Section 951, provides
6 that:

7 Whoever, other than a diplomatic or consular
8 officer or attaché, acts in the United States as an agent of
9 a foreign government without prior notification to the
10 Attorney General shall be guilty of a crime.

11 The addendum reads as follows with regard to
12 Count Two:

13 In or about and between September 2016 and
14 December 2019, both dates being approximate and inclusive,
15 within the Eastern District of New York and elsewhere, the
16 defendants Michael McMahon, Zheng Congying and Zhu Yong,
17 also known as Jason Zhu, together with others did knowingly
18 act in the United States as agents of a foreign government,
19 to wit: The People's Republic of China government, without
20 prior notification to the Attorney General of the United
21 States as required by law.

22 To prove a violation of the crime charged in Count
23 Two of the indictment, the Government must establish each of
24 the following elements beyond a reasonable doubt:

25 First, the defendant acted as an agent of a

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1 foreign government or official, specifically of China.

2 Second, the defendant failed to notify the
3 Attorney General that he would be acting as an agent of the
4 government or an official of China in the United States
5 prior to so acting.

6 Third, the defendant acted knowingly.

7 And fourth, the defendant acted, at least in part,
8 as an agent for the Government or an official of China while
9 in the United States.

10 The term "foreign government" includes any person
11 or group of persons exercising authority in fact or by law
12 or right over any country other than the United States, or
13 over any part of such country, and includes any subdivision
14 of any such group or agency to which such sovereign
15 authority or functions are directly or indirectly delegated.

16 The term "agent of a foreign government" means an
17 individual other than a diplomatic or consular officer or
18 attaché who agrees to operate in the United States subject
19 to the direction or control of a foreign government or
20 foreign government official.

21 Simply acting in accordance with foreign interests
22 does not make a person an agent of a foreign government. To
23 be an agent of a foreign government, a person must do more
24 than act in parallel with a foreign government's interest or
25 pursue a mutual goal. The Government must prove that the

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1 defendant acted pursuant to an agreement to operate subject
2 to the direction or control of China, and that a Chinese
3 official directed or controlled the defendant's actions.

4 A foreign government or official's involvement in
5 the relationship does not need to be that of an employer of
6 the defendant; a lesser degree of control is sufficient. A
7 person who agrees to operate subject to a more hands-off
8 form of direction would also be operating as an agent of a
9 foreign government. An agreement to act as an agent of a
10 foreign government need not be contractual or formalized,
11 nor must payment or other compensation be received. The
12 agreement may be established either by direct contact
13 between the agent and foreign government or indirect contact
14 through an intermediary or intermediaries.

15 You do not need to find that a defendant was an
16 agent during the entire period specified in the indictment.
17 If all jurors agree that it has been shown beyond a
18 reasonable doubt that a defendant was an agent of China at
19 any time within that period, and the Government has proven
20 beyond a reasonable doubt all other elements of the offense
21 as set forth in these instructions, then you must find that
22 defendant guilty of Count Two.

23 To find the defendant guilty of this offense, you
24 must find that the defendant knew that he was acting as an
25 agent of the Government or an official of China and knew

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1 that he had not provided prior notification to the Attorney
2 General. I have already instructed you to what "knowingly"
3 means, and you should apply that instruction here. It is
4 not necessary, however, for the Government to prove that a
5 defendant knew that there was a law that required him to
6 provide notification to the Attorney General. Ignorance of
7 the law is not a defense to this crime.

8 The parties have stipulated that none of the
9 defendants, nor the alleged co-conspirators, have notified
10 the Attorney General related to the alleged conduct in this
11 case.

12 Count Three of the indictment alleges that the
13 defendants conspired to commit an offense against the United
14 States, in violation of Title 18, United States Code Section
15 371, which I have previously instructed you on. The
16 Government alleges that the object of the conspiracy was for
17 the defendants, together with others, to travel in
18 interstate and foreign commerce with the intent to harass
19 and intimidate, and place under surveillance with the intent
20 to harass and intimidate certain individuals, namely Xu Jin,
21 Liu Fang, and Xu Xinzi, also known as Sabrina Xu, in
22 violation of federal law.

23 Specifically, Count Three of the indictment
24 charges that:

25 In or about and between September 2016 and

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1 December 2019, both dates being approximate and inclusive,
2 within the Eastern District of New York and elsewhere, the
3 defendants Michael McMahon, Zheng Congying, and Zhu Yong,
4 also known as Jason Zhu, together with others, did knowingly
5 and willfully conspire to travel in interstate and foreign
6 commerce with the intent to harass and intimidate, and place
7 under surveillance with the intent to harass and intimidate
8 one or more persons, to wit: Xu Jin, Liu Fang, Xu Xinzi,
9 also known as Sabrina Xu. And in the course of and as a
10 result of such travel, to engage in conduct that would
11 cause, would attempt to cause, and would be reasonably
12 expected to call Xu Jin, Liu Fang, Xu Xinzi always known as
13 Sabrina Xu, substantial emotional distress, contrary to
14 Title 18, United States Code Section 2261A(1)(B).

15 I have also instructed you with respect to the law
16 of conspiracy. Those same principles apply here.

17 As I explained with regard to the conspiracy
18 charge indeed Count One, the Government need not prove that
19 the defendants actually committed the unlawful act charged
20 as the object of the interstate stalking conspiracy.

21 Rather, if you find that the defendant you are considering
22 knowingly and intentionally agreed to commit this crime,
23 then you should find that defendant guilty of Count Three.

24 As I also just reminded you with regard to Count
25 One, the crime of conspiracy charged in Count Three is

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1 separate and distinct from the actual violation of any
2 specific law, and therefore you may find the defendant
3 guilty of the offense charged in Count Three even if you
4 find that there was no violation of the law prohibiting
5 interstate stalking.

6 Finally, as I previously mentioned with regard to
7 Count One, the conspiracy charged in Count Three requires
8 proof of at least one overt act. I will not read the overt
9 acts charged in the indictment, but you will receive a copy
10 of the Overt Objects alleged in Count Three of the
11 indictment to review during your deliberations. My prior
12 instructions about overt acts apply to Count Three as well.

13 Count Four of the indictment charges the
14 defendants with engaging in interstate stalking in violation
15 of federal law. Specifically, Count Four of the indictment
16 charges that:

17 In or about and between September 2016 and
18 December 2019, both dates being approximate and inclusive,
19 within the Eastern District of New York and elsewhere, the
20 defendants Michael McMahon, Zheng Congying, and Zhu Yong,
21 also known as Jason Zhu, together with others, did knowingly
22 and intentionally travel in interstate and foreign commerce
23 with the intent to harass and intimidate, and place under
24 surveillance with the intent to harass and intimidate one or
25 more persons, to wit: Xu Jin and Liu Fang; and in the

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1 course of and as a result of such travel, engaged in conduct
2 that caused, attempted to cause, and would be reasonably
3 expected to cause Xu Jin and Liu Fang substantial emotional
4 distress.

5 The statute relevant to Count Four of Title 18 of
6 the United States Code Section 2261A(1)(B), which provides
7 in relevant part:

8 Whoever travels in interstate or foreign commerce
9 with the intent to harass, intimidate, or place under
10 surveillance with intent to harass, intimidate another
11 person, and in the course of or as a result of such travel
12 or presence engages in conduct that causes, attempts to
13 cause, or would reasonably be expected to cause substantial
14 emotional distress to a person, shall be guilty of a crime.

15 In order to prove the defendant guilty of
16 interstate stalking as charged in the indictment, the
17 Government must prove beyond a reasonable doubt each one of
18 the following three elements:

19 First, that the defendant traveled in interstate
20 or foreign commerce as charged in the indictment.

21 Second, that the defendant traveled in interstate
22 or foreign commerce with the intent to harass or intimidate
23 or place under surveillance with the intent to harass or
24 intimidate Xu Jin or Liu Fang.

25 And third, that in the course of or as a result of

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1 such travel, the defendant caused, attempted to cause, or
2 reasonably expected to cause substantial emotional distress
3 to Xu Jin Liu Fang or a member of either Xu Jin's or Liu
4 Fang's immediate family.

5 I will explain each of these elements to you in
6 more detail.

7 The first element that the Government must prove
8 beyond a reasonable doubt is that the defendant traveled in
9 interstate or foreign commerce as charged in the indictment.
10 Travel in interstate or foreign commerce simply means travel
11 between two states or between the United States and a
12 foreign country.

13 The second element that the Government must prove
14 beyond a reasonable doubt is that the defendant traveled in
15 interstate commerce with the intent to harass, intimidate,
16 or place under surveillance with intent to harass or
17 intimidate Xu Jin or Liu Fang. Harass means to annoy
18 persistently or to create an unpleasant or hostile
19 situation.

20 Direct proof of a person's intent is almost never
21 available. It would be a rare case where it would be shown
22 that a person wrote or stated that as of a given time he or
23 she committed an act with a particular intent. Such direct
24 proof is not required. The ultimate fact of intent, though
25 subjective, may be established by circumstantial evidence

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1 based upon the defendant's outward manifestations, his
2 words, his conduct, his acts, and all the surrounding
3 circumstances disclosed by the evidence and the rational or
4 logical inferences that may be drawn from them.

5 The third element that the Government must prove
6 beyond a reasonable doubt is that in the course of or as a
7 result of such travel, the defendant engaged in conduct, the
8 result of which caused, attempted to cause, or would be
9 reasonably expected to cause substantial emotional distress
10 to Xu Jin or Liu Fang or an immediate family member.

11 To establish this element, the Government must
12 prove that as a result of the defendant's conduct during or
13 after the travel in interstate commerce, Xu Jin or Liu Fang
14 or an immediate family member of Xu Jin or Liu Fang suffered
15 substantial emotional distress as a result of the
16 defendant's conduct, or that the defendant attempted or
17 reasonably expected to cause that emotional distress.

18 The term "immediate family member" means a spouse,
19 parent, brother, sister, child, or ward. The term also
20 includes any other person living in Xu Jin's or Liu Fang's
21 household and related to Xu Jin or Liu Fang by blood or
22 marriage.

23 All right. We are now in the home stretch.

24 I have now outlined for you the rules of law
25 applicable to this case, the process by which you weigh the

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1 evidence and determine the facts, and the legal elements
2 that must be proved beyond a reasonable doubt. In a few
3 minutes, you will retire to the jury room for your
4 deliberations. I will now give you some general rules
5 regarding your deliberations. Keep in mind that nothing I
6 have said in these instructions is intended to suggest to
7 you in any way what I think your verdict should be. That is
8 entirely for you to decide.

9 By way of reminder, I instruct you, once again,
10 that it is your responsibility to Judge the facts in this
11 case from the evidence presented during the trial and to
12 apply the law as I have given it to you, and your verdict
13 must be based solely on this evidence and law, not on
14 anything else.

15 For your deliberations to proceed in an orderly
16 fashion, you must have a foreperson. The custom in this
17 courthouse is for Juror Number 1 to act as the foreperson.
18 However, if when you begin deliberations you decide that you
19 want to elect another foreperson, you are entitled to do so.
20 The foreperson will be responsible for signing all
21 communications to the Court, for handing them to the Deputy
22 Marshal during your deliberations. But, of course, his or
23 her vote is entitled to no greater weight than that of any
24 other juror.

25 It is very important that you not communicate with

Charge of the Court

2201

1 anyone outside the jury room about your deliberations or
2 about anything touching on this case. There is only one
3 exception to this rule. If it becomes necessary during your
4 deliberations to communicate with me, you may send a note
5 through the Deputy Marshal signed by your foreperson. No
6 member of the jury should attempt to communicate with me
7 except by a signed writing, and I will never communicate
8 with any member of the jury on any subject touching upon the
9 merits of the case other than in writing or orally here in
10 open court.

11 Your recollection governs; nobody else's. If in
12 the course of your deliberations your recollection of any
13 part of the testimony should fail, or you should find
14 yourself in doubt concerning my instructions to you on the
15 law, you may request that a witness's or witnesses'
16 testimony or portions thereof be sent back to you in the
17 jury room. Again, you may make such a request by note to
18 the Deputy Marshal. I suggest, however, that you be
19 specific to avoid receiving testimony that you do not want
20 or need. Describe as best and precisely as you can what you
21 want to hear, and be patient, because it sometimes takes a
22 while to find the testimony in the record.

23 To the extent possible, the exhibits that were
24 admitted as evidence during the trial will be sent back to
25 you for your deliberations.

Charge of the Court

2202

1 I will note that because there is videotape
2 evidence, we'll also provide you with a laptop computer and
3 the videotape evidence on a flash drive that will have a
4 password.

5 (Discussion off the record.)

6 THE COURT: We had a problem with the last trial
7 where the password was a bit confounding to the jurors, so
8 we've improved on that, and now those videos are loaded onto
9 this laptop, so you can access them directly without having
10 to enter a password.

11 Thank you for that, Government and Fida.

12

13 (Continued on the next page.)

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Charge of the Court

2203

1 (Continuing.)

2 THE COURT: Okay. Your duty is to reach a fair
3 conclusion from the law as I have given it to you and the
4 evidence that has been presented in this case. This duty is
5 an important one. When you are in the jury room, listen to
6 each other and discuss the evidence and issues in the case
7 amongst yourselves.

8 It is the duty of each of you as jurors to consult
9 with one another and to deliberate with a view towards
10 reaching agreement on a verdict if you can do so without
11 violating your individual judgment and conscious. While you
12 should not surrender conscientious convictions of what the
13 truth is and of the weight and effect of the evidence, and
14 while each of you must decide the case for yourself and not
15 merely acquiesce in the conclusion of your fellow jurors, you
16 should examine the issues and the evidence before you with
17 candor and frankness, and with proper deference to and regard
18 to the opinions of your fellow jurors.

19 You should not hesitate to reconsider your opinion
20 from time to time and to change them if you are convinced they
21 are wrong. However, do not surrender an honest conviction as
22 to the weight and effect of the evidence simply to arrive at a
23 verdict.

24 The decision you reach must be unanimous. You must
25 all agree.

Charge of the Court

2204

1 When you have reached a verdict, simply send me a
2 note signed by your foreperson that you have reached a
3 verdict. Do not indicate what the verdict is. In no
4 communication with the Court should you give a numerical count
5 of where the jury stands in its deliberations.

6 Remember, in your deliberations that the
7 Government's charges against the defendants are no passing
8 matter. The parties and the Court are relying on you to give
9 full conscientious deliberation and consideration to the
10 issues and evidence before you. In so doing, you carry out to
11 the fullest your oaths as jurors to well and truly try the
12 issues of this case and render a true verdict.

13 And let me add that you will receive a verdict
14 sheet, and that's where you will indicate what your verdict
15 is.

16 All right. Let me speak at sidebar with the parties
17 to make sure that there's nothing else I need to advise you
18 on.

19
20 (Sidebar held outside of the hearing of the jury.)

21 (Continued on next page.)
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Sidebar

2205

1 (The following sidebar took place outside the
2 hearing of the jury.)

3 THE COURT: First, starting with the Government.
4 Anything else that I need to advise the jury?

5 MR. HEEREN: No, Your Honor.

6 THE COURT: Mr. Lustberg?

7 MR. LUSTBERG: I want to be sure that we've
8 preserved our objections.

9 THE COURT: Mr. Goldberger.

10 MR. GOLDBERGER: Nothing further.

11 THE COURT: And Mr. Tung?

12 MR. TUNG: Nothing further.

13 THE COURT: Thank you. We will send everything back
14 with them.

15 Have you folks agreed on the exhibits with
16 Ms. Gonzalez that were admitted?

17 MR. HEEREN: I believe so.

18 THE COURT: Excellent. All right.

19 (Sidebar ends.)

20 (Continued on next page.)
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Sidebar

2206

1 (Continuing.)

2 THE COURT: We're now going to call forward our
3 marshal to be sworn in.

4 (Marshal approaches.)

5 THE COURTROOM DEPUTY: Please raise your right hand.
6 Do you solemnly swear or affirm that you will keep the jurors
7 in this cause together in a quiet and convenient place and to
8 let no one speak to them, nor shall you speak to them about
9 direction of this court?

10 THE MARSHAL: I will.

11 THE COURTROOM DEPUTY: Thank you.

12 THE COURT: In a moment, folks, we will let you go.
13 But I do want to make two other comments. One is your lunch
14 will be brought to you around 1:00, assuming it's on time.
15 You can deliberate while you are having lunch, or not, but you
16 should decide amongst yourselves how you want to proceed. But
17 you are free to deliberate over lunch if you choose to do so
18 and you'll all agree to do so.

19 And the only other thing is we will send back, as I
20 said, a copy of the instructions to you, as well as a verdict
21 sheet, and then all of the exhibits will be sent back to you,
22 as well.

23 All right. Thank you, everyone. You are now
24 excused for your deliberations.

25 THE COURTROOM DEPUTY: All rise.

Sidebar

2207

1 (Jury exits to begin deliberations at 11:46 a.m.)

2 THE COURT: Please be seated, everyone. So, as I
3 mentioned before, the only thing we require you folks to do is
4 to leave your cellphone numbers with Ms. Gonzalez and don't
5 leave the courthouse so that if we get a note, you can come
6 back quickly.

7 I think the only other comment I want to make is, as
8 you heard, I told my law clerk to make some very small
9 typographical changes. So those were made to the copy that
10 will be sent back to the jury. I think you may want to wait
11 one moment just to see everything that was sent back.

12 I saw actually Ms. Gonzalez carrying the laptop, so
13 she -- let me confirm with my law clerk.

14 So I don't think it's necessary for you to flyspeck
15 the instructions that are being sent back. But just so you
16 know and for the record, the jury instructions will be marked
17 as Court Exhibit 1, and the verdict sheet will be marked as
18 Court Exhibit 2.

19 (Court Exhibits 1 and 2 received in evidence.)

20 THE COURT: Once you have left your phone numbers,
21 you are free to go.

22 MR. HEEREN: Your Honor, I think just to -- I think
23 this is the case, but just to clarify. The alternates are
24 being kept, but they're just being kept in a separate place.

25 THE COURT: That is correct, yes. As is my practice

Sidebar

2208

1 to keep them here during the deliberations should we, God
2 forbid, lose one of our jurors during deliberations, but they
3 are in a separate room.

4 MR. HEEREN: Thank you.

5 THE COURT: All right. So, folks, you are free to
6 go.

7 (Recess taken.)

8 THE COURT: So we're going to go on the record for a
9 moment just to recap a bit of what's happened since the jury
10 started deliberating. So there was a note marked as Court
11 Exhibit 3 that Ms. Gonzalez apprised everyone of and it simply
12 said, "Can we get 12 copies of the overt acts and tape for
13 attaching poster board notes," and parenthetically they wrote
14 "the large sheets of paper" and then "to the wall" question
15 mark. And that was marked as Court Exhibit 3.

16 (Court Exhibit 3 received in evidence.)

17 THE COURT: And Ms. Gonzalez took care of that
18 request by providing the 12 copies of the overt acts and some
19 tape. The next note we just received has been marked as Court
20 Exhibit 4.

21 (Court Exhibit 4 received in evidence.)

22 THE COURT: Court Exhibit 4 reads, "We can't hear
23 the audio from the videos on the laptop, specifically GX 703C,
24 loud enough. Is there another way we can listen to what was
25 said in the video? Can we get the jury room A/C higher to

Sidebar

2209

1 make it cooler?"

2 So Ms. Gonzalez put the request in about the A/C to
3 our facilities folks and otherwise we're arranging for the
4 playing of 703C.

5 (Jury enters.)

6 THE COURT: So everyone please be seated.

7 Ladies and gentlemen of the jury, I apologize for
8 the heat or temperature in the jury room. As you know,
9 Ms. Gonzalez called to have it taken care of. It seems at
10 least some progress has been made or at least you're relieved
11 to be here in this courtroom where he's much cooler. We
12 received your last note about the difficulty of hearing the
13 audio from the video marked as Government Exhibit 703C.

14 So the solution we've come up with is to play that
15 video here with the benefit of the better speakers and the
16 projection onto the wall. So, we'll play it all the way
17 through.

18 How many minutes is it, Mr. Heeren?

19 MR. HEEREN: It's about seven minutes.

20 THE COURT: And then you'll let us know if you want
21 to hear it again; or if anyone wants it to be stopped, raise
22 your hand and then we can do that. All right?

23 Let's go ahead and play Government Exhibit 703C from
24 the beginning.

25 (Video played; video paused.)

Sidebar

2210

1 THE COURT: Does anyone want it replayed? The first
2 minute? We'll replay the first minute.

3 (Video played; video paused.)

4 THE COURT: All right. Thank you very much.

5 Ladies and gentlemen of the jury, you can return to
6 the jury room to continue your deliberations.

7 (Jury exits to continue deliberations at 4:48 p.m.)

8 THE COURT: Everyone is free to go until we get
9 another note.

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12 (Matter adjourned until Friday, June 16, 2023 at 9:30 a.m.)

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I N D E X

CONTINUED REBUTTAL CLOSING ARGUMENT

BY MR. HEEREN

2126

JURY CHARGE BY THE COURT

2148

E X H I B I T S

Court Exhibits 1 and 2

2207

Court Exhibit 3

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Court Exhibit 4

2208

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